LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 4 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term 1970
No. 1144

EDWIN G. MELZER

PETITIONER

- vs -

STATE OF OHIO

RESPONDENT

BRIEF IN OPPOSITION

GEORGE C. SMITH
Prosecuting Attorney
Franklin County Court House
Columbus, Ohio 43215
DAVID H. BODIKER
Assistant Prosecuting Attorney
Franklin County, Ohio
Franklin County Court House
Columbus, Ohio 43215
and
LEO J. CONWAY
Assistant Attorney General
State of Ohio
40 South Third Street
Columbus, Ohio 43215
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF THE CASE 1
QUESTIONS OF LAW PRESENTED 7
LAW AND ARGUMENT 8

I
THE SEARCH WARRANT 8
II
THE MUNICIPAL ORDINANCE 9
III
THE QUESTION OF CONSENT TO SEARCH 11
IV
THE QUESTION OF HARMLESS ERROR 12

CONCLUSION 14
AFFIDAVIT 14

TABLE OF AUTHORITIES

Aguilar v. *Texas*, 378 U. S. 108 (1964) 8
Bumper v. *North Carolina*, 391 U. S. 543 (1968) 11
Camara v. *Municipal Court*, 387 U. S. 523 (1967) 9
Chapman v. *California*, 396 U. S. 18 (1967) 13
Colonnade Catering Corp. v. *United States*, 90 Sup. Ct. 774 (1970) 10
Harrington v. *California*, 395 U. S. 250 (1969) 13
See v. *Seattle*, 387 U. S. 541 (1967) 9
Spinelli v. *United States*, 89 S. Ct. 584 (1969) 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970
No. 1144

EDWIN G. MELZER
Appellant–Petitioner
vs
STATE OF OHIO
Appellee–Respondent

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The defendant, Edwin G. Melzer, was directly indicted by the Grand Jury of Franklin County on August 17, 1967, on four separate counts involving his possession of and actions with a 1964 Pontiac, stolen from Cleveland, Ohio. The first count charged Melzer with attempting to procure a certificate of title for the automobile knowing it to be stolen. The second count charged him with unlawfully buying or concealing the automobile knowing it to be stolen. The third count, which was a misdemeanor, charged him with possession of an auto from which the serial number was removed for the purpose of concealing the identity. The final count charged him with making a false statement in the application for certificate of title.

Melzer was arraigned on these charges on September 8, 1967, and at that time, entered a plea of not guilty to the indictment. Shortly thereafter, on September 28, 1967, cousel for defendant filed a motion to suppress "any and all property or things" seized in the course of a search on July 17, 1967, on the premises at 1632 Refugee Road by law enforcement officers.

The motion was immediately set down for oral hearing on October 27, 1967 and the defense proceeded to call a clerk of the criminal division of the Municipal Court, who had been subpoenaed, *duces tecum*, to bring with him all papers relating to search warrant No. 47. These were marked and introduced into evidence and the defense rested.

Argument was made that the affidavit for the warrant was defective and therefore the warrant could not properly issue and anything seized pursuant to such a warrant could not be admitted against defendant. Some suggestion was made that further evidence of the search could be introduced if the Court desired, but none was ever offered.

The prosecution then moved to strike the exhibit from the files since, without any evidence of a search being conducted, the exhibit was irrelevant and immaterial, (Tr. 20), and further asked that the motion to suppress be overruled for the failure to produce any evidence to show that such motion was necessary (Tr. 22).

The Court refused to rule on the motions and stated "That can be tied up and the Court will take all motions under advisement [Tr. 22]." Counsel for defendant then requested an order to continue the hearing which was granted by the Court.

Nothing further was done on the case until January 23, 1968, when the Court issued a decision holding that the search was conducted in violation of defendant's constitutional rights and sustaining the motion to suppress. Before the decision was journalized the state filed a motion to reconsider and a memorandum in support. The Court rendered a second decision on the matter on March 18, 1968, stating that it had acted because the parties were "in default," but that in fairness, it would vacate the previous decision and permit one further hearing where both parties may present evidence.

This further hearing was held on July 3, 1968. The defendant was called to present whatever further evidence he had, but he chose to rest on the evidence previously offered

and argued that it was sufficient to require the state to go forward (Tr. 27).

The state moved to dismiss the motion to suppress on the ground that there was not sufficient evidence, but the Court would not rule on this, and demanded that the state proceed with evidence. An exception to the Court's withholding a ruling was read into the record (Tr. 32), and the state then called Detective Barnett as a witness.

On direct examination, Barnett attempted to explain the information received, which formed the basis for his affidavit, but this was objected to by the defense counsel (Tr. 35). He stated, then, that after obtaining the warrant from the Municipal Court he went to 1632 Refugee Road with four other men, including two F.B.I. agents and a man from the National Auto Theft Bureau. Upon arrival, Barnett said that he went into the office and was met by the defendant, Melzer. He handed him the search warrant and also handed him a copy of Columbus Municiapl Code Section 543.04 which pertains to the right of police officers to enter garages and junk yards and inspect for automobiles believed to have been stolen.

Melzer apparently read the warrant, including the part about an informant, and said, "Why didn't you put that SB's name on there [Tr. 37]?" Melzer then said, "You don't need this. You can have anything in the place. Take anything you want[Tr. 38]." He apparently repeated this later when actual parts of an automobile were seized.

The 1965 Chevrolet which formed the basis for the search was not found, but various body parts to a 1964 Pontiac were discovered and these were taken by police. (The parts were identified at trial as coming from a car actually purchased by Melzer, as salvage, whose identification and serial number had been switched to another Pontiac, stolen in Cleveland, and found in the possession of Melzer's daughter a few days before the search.) At the time the officers departed, a receipt was obtained from Melzer by them that these items were the only items taken.

No other evidence was offered and the court reserved all

rulings. Briefs were submitted by both sides and the Court rendered a final decision on July 31, 1968, overruling the motion to suppress. The Court felt that police had authority to enter the premises under the warrant "since the judge must have been satisfied that proper grounds existed" and also under the authority of the Municipal Code section used. The Court also stated that defendant gave consent to the search, and that he did not meet the burden of showing a *prima facie*, case for suppression or proper standing even to raise the issue by showing some interest in the premises searched.

Detective William Barnett was again the first witness for the prosecution at trial. He first explained the circumstances of July 14, 1967, which caused him and his partner to first observe and then follow a 1964 Pontiac, driven by the defendant's daughter as it left the premises of Tracy Auto Parts. The vehicle was eventually stopped and the girl asked to show her driver's license and registration.

The driver's license was in her purse and she indicated that the registration was attached to the steering column. In examining the registration, Barnett observed that some numbers on the registration had been typed over and this caused him to look down at the serial plate which was attached to the door post. He saw that this was attached with what appeared to be "pop rivets" and he knew that the normal way these plates were attached was by spot welding. This made Barnett suspicious of the vehicle identification and resulted in the impounding of the car at that time.

On the same day that the vehicle was impounded, Barnett stated that he contacted Paul Gilliland of the National Auto Theft Bureau and requested that he examine it. Such examination was made on the 14th and a more thorough examination was made on the 15th by Gilliland, each time in Barnett's presence, and on the second day the confidential numbers were brought up.

At trial Gilliland testified that from his examination he determined that the car was actually one stolen from Cleveland, Ohio, from a John Gambol in August, 1966. The associ-

ation records further showed that this Pontiac had been manufactured in Pontiac, Michigan, and initially shipped to Cleveland for sale. This was verified by the official records of the Pontiac Motor Division which were introduced and by testimony from Mr. Gambol, the owner, and the Cleveland Police who investigated the theft.

The various body parts taken during the search of Tracy Auto Parts on the 17th of July, were also taken by Barnett to the impounding lot and assembled there as best possible. The lock cylinder numbers from the door and trunk were checked by both Barnett and Gilliland and were found to correspond to those assigned to the vehicle whose title and identification number were being used by the stolen vehicle being driven by defendant's daughter at her arrest.

The official factory records showed that these numbers belonged to car manufactured in Georgia and shipped to Florida for sale. Mr. John Sullivan then testified that he purchased such a 1964 Pontiac in Florida, returned to Ohio and drove it until November 1965, when it was totally demolished in an accident. He further said that he sold the scrap in January of 1966 to Melzer for $300.00, and signed the title over to him at that time.

Sullivan testified that he had nothing to do with the car again until contacted by Barnett and taken to the impounding lot in July - August of 1967. He specifically denied that the car found in Connie Melzer's possession was his car, but stated that "parts" which were taken from Tracy Auto Parts were similar in all respects to the car he sold Melzer, even to the damaged chrome strip and the Titusville sticker put on the car when he purchased it in Florida.

Donald Thompson was an employee of Melzer's at Tracy Auto Parts and was the man who originally contacted the police about the activities at the business and the various stolen cars. In regard to this matter, he testified that he first went to work for Melzer in October, 1966, and that at that time Melzer was in possession of a 1964 blue Pontiac Catalina which he was driving around with tags on it and that it looked "like it had just been

driven off the showroom floor." He also remembers at this same time that there was a green 1964 Pontiac, which was a "total loss" just sitting out on the property (Tr. 441).

In approximately March of 1967 Thompson testified that Melzer had the blue Pontiac brought into the body shop and "he walked into the big shop and he had a set of license plates and a yellow title and a little metal plate [Tr. 444]." He told another employee to hurry up and get the top of the car painted white which was done in Thompson's presence and Melzer himslef changed the vehicle identification plates on the door post and on the cowl by use of a pop rivet. Thompson also testified that subsequent to these actions and up to the time he quit, he saw Melzer using this car in the altered condition and that also up to the time he quit, the green Pontiac salvage just remained sitting in the yard.

The state also introduced the pertinent records from the Ohio Bureau of Motor Vehicles showing the chains of title of the two cars as well as the records of the county clerk showing the various applications for title and licenses. The state's final witness was a hand writing expert who testified that the writings on all the questioned documents were made by the defendant.

No evidence was submitted by the defense and no witnesses called. After arguments, the case was submitted to the jury and a verdict of guilty was returned to all four counts.

On December 9, 1969, the Court of Appeals, in a lengthy decision, affirmed the judgment of the Court of Common Pleas. The Court, however, found that the search of the premises, bases upon the search warrant obtained from the Franklin County Municipal Court, was improper but that "the error of inclusion committed herein did not affect the substantial right of this defendant, that such was not prejudicial, and that such error was harmless beyond a reasonable doubt."

The defendant appealed this decision to the Ohio Supreme Court (Case No. 70-150) but after memoranda in support of and opposing jurisdiction were filed and after arguments of counsel, the case was dismissed *sua sponte* on the basis that no substantial constitution question was involved.

QUESTIONS OF LAW PRESENTED

(1) Is the clerical ommission of the word "stolen" in the typed affidavit to obtain a search warrant which fact does appear in the warrant itself signed by the issuing judge, in the absence of any other explanation, fatal to the validity of the warrant, where the information of the whereabouts of the vehicle was obtained from a reliable informant who had previously given reliable information in the past which the affiant had verified, and the vehicle itself was specifically described, including the make, color, and serial numbers, and the place from which it was stolen? (2) Is the entry by police pursuant to the authority of a municipal ordinance upon the public portions of commercial premises for certain described articles included within the purview of the ordinance, which entry is not objected to in any way by the owner of the premises who gratuitously suggests that the officers take what they want, an unreasonable invasion of privacy prohibited by the Constitution of the United States? (3) Is the consent of the defendant valid and not the product of coercion where the police enter on the premises of defendant armed with a search warrant, later to be determined invalid, which is presented to defendant and read by him and the defendant not only does not object to the search but in fact tells the police that a warrant was not necessary and that they are free to take what they want, and the trial judge who hears the evidence finds that the defendant did consent to the searchand that the consent was freely and voluntarily given? (4) Is the allegedly erroneous admission into evidence of items unlawfully seized harmless beyond a reasonable doubt and not grounds for reversal of the conviction where the remaining evidence at trial which was uncontradicted, overwhelmingly sufficient, as found by the Court of Appeals, to establish independently the elements of the offense beyond a reasonable doubt?

LAW AND ARGUMENT

I

THE SEARCH WARRANT

It is not disputed that the affidavit for the search warrant in this case was defective on its face since there is no indication of the offense or crime necessitating the search. The affidavit, however, is not decisive of the validity of the warrant and the court or magistrate to whom it is presented may demand other and further evidence before issuing the warrant. (See Section 2933.23, Revised Code of Ohio.) Unfortunately, the record at the hearing on the motion to suppress is barren of such further information and the efforts by Detective Barnett to provide some explanation were objected to by defense counsel and not admitted.

The warrant, itself, does, however, remedy the one requisite omitted and we must assume that it was in fact only a clerical omission. The affidavit made no mention of the offense charged, in relation to the car to be searched for, but the warrant spells out not only the car and the serial number, but the fact that it was a stolen car and even gave the street address from which it had been stolen. In the absence of any other explanation, we must assume that such information was presented to the magistrate before the warrant was issued and therefore satisfies statutory and constitutional requirements.

The petitioner has also urged, and the Court of Appeals so found, that the second requirement of *Aguilar* v. *State of Texas*, 378 U. S. 108 (1964), the informant's reliability, was not met and that the statements in the affidavit were merely conclusionary. We disagree. The seeming objection in both *Aguilar* and *Spinelli* v. *United States*, 393 U. S. 410 (1969) was that the affidavits merely characterized the informant as "reliable" or "credible.." without any reason in support of the conclusion. Here the affidavit particularly states that the informer had given the affiant reliable information in the past. This should be sufficient.

In view of the specificity in the description of the car, including the serial number, and the verification of the infor-

mer's reliability, there was sufficient probable cause to issue the warrant and the warrant on its face is proper.

It is interesting to note that everybody, Melzer included, knew who the unknown informant was and on *vior dire* hearing on the second motion to suppress Detective Barnett was questioned extensively about this by defense counsel. Barnett explained that he had received considerable information in the past from the informant, Thompson, and that he at first had questions about his reliability, but that his reliability had been proven before the search warrant " by a couple of other things which has be proven to be correct [Tr. 88-92]."

II
THE MUNICIPAL ORDINANCE

At the inception of this search as police officers came up to defendant, Detective Barnett testified that he handed Melzer a copy of the search warrant and also a copy of Section 543.04 of the Columbus City Code which gives police officers the right to go onto licensed garage or junk yard premises to inspect for stolen cars or automobile parts. He explained his reasons for this because "we wanted to be doubly sure we would be -- we would take the property legally if we found the automobile we was looking for and . . . [Tr. 61]." . . "Well, in this day and age with all the Supreme Court rulings you don't know whether you are right or not [Tr. 61]."

In the final decision on the first motion to suppress, the trial court held that:

> "...The facts are such that the police had authority to enter upon the junkyard premises to make the search under Section 543.04 of the Municipal Code."

Appellant, in the Court of Appeals, argued, on the basis of this Court's decisions in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and *See* v. *Seattle*, 387 U. S. 541 (1967), that this legislation subverted the constitutional rights of defendant and gave the officers carte blanc authority "to go into the premises and rummage about."

The Court of Appeals, in its decision, somewhat confusingly held that the trial court was incorrect in its conclusion but that

it was unnecessary to decide specifically whether *Camara* and *See* would be applicable, and thereby invalidate this ordinance as it relates to the granting of authority to the police to enter private property to make a warrantless search. Apparently, the court felt that irrespective of the validity of the original entry "it is our opinion that a subsequent search resulting in a seizure of private property cannot be held to be a lawful search and seizure of private property in the absence of a valid search warrant."

We do not see the distinction: particularly where the same court, in response to appellant's earlier questions as to the scope of the search said that: (p. 16) "...had the search warrant here been valid in other respects, the seizure of the Pontiac parts in question would not have been unwarranted as being beyond the scope of the search in that such parts were in plain view of the officers..."

A somewhat analogous problem was raised in the recent case of *Colonnade Catering Corp.* v. *United States*, 90 S. Ct. 774 (1970). There this Supreme Court found no problem whatsoever with the entry of federal agents on the private property of the licensee or with the inspection of the liquor of the premises. They held, however, that the exclusive remedy for the refusal to permit entry upon "private" commercial property was the statutory fine and not the seizure of the contraband goods. But even this was not a prohibition against seizure, as such, but a determination of the consequences of the failure to give consent by the owner.

In the instant case we do not even get to this problem. There was neither an entry into the portions of the commercial premises not open to the public nor the lack of consent. Nothing which was done here, was not also done in the *Colonnade* case and expressly approved by this Supreme Court, both majority and dissent.

The ordinance in question here pertains to a narrow class of business establishments most likely to become involved, innocently or otherwise, in trafficking in stolen vehicular merchandise, which was the only legitimate object for examination

by law officers acting in accordance with this section. The defendant does not contend that his private offices or papers were "rummaged" and the only evidence in the record pertains to a search of stacks of dissembled vehicles and parts thereof, ordinarily accessible to the public upon entry into the premises. Nothing in *Camara* and *See* prohibits such conduct not invalidates the ordinance involved.

III
THE QUESTION OF CONSENT TO SEARCH

In the final decision on the first motion to suppress, the trial court also concluded that: "The evidence shows that defendant gave consent to the search which would have cured any technical defects in the search warrant." The appellant then contended in the Court of Appeals on the authority of *Bumper* v. *North Carolina*, 391 U. S. 543, 88 S. Ct. 1788 (1968), that the consent which was obtained only after the search warrant was presented, is constitutionally invalid and in effect the product of the coercion of the search warrant and the acquiescence to a claim of lawful authority. This position was adopted by the Court of Appeals in its decision. We feel this also was incorrect.

In *Bumper*, no search warrant was ever presented and it is not clear whether the police actually had one. Mrs. Hattie Leath, the sixty-six year old negro grandmother of the defendant and the owner of the house searched, insisted that she acted from her own free will, but the majority of the Court found that where there is coercion there cannot be consent. The Court did not rule out all consent, but held that the prosecutor has the burden of proving that the consent was, in fact, freely and voluntarily give, which burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

The situation herein is considerably different. The defendant is a large, agressive person, not easily intimidated. The evidence shows that he made a number of trips to the police station after his daughter's arrest and demanded the return of his gun. When

the police arrived and showed him the warrant, he said: "You don't need this. You can have anything in the place. Take anything you want [Tr. 38]," which statements were repeated later when various parts of the automobile were seized.

Melzer knew the informant, Thompson, and asked the police, "Why didn't you put that SB's name on there[Tr. 37]?" When the Pontiac door was found, Melzer stated that he knew why the police were there and he would tell them all about it as soon as he talked to his attorney(Tr. 512).

Obviously Melzer is a different proposition than the grandmother in *Bumper*. The mere authority of the law officers would be much less impressive and his acquiescence would certainly not be automatic. The specific distinction with *Bumper*, however, is that he did not merely agree to a search, but stated that the warrant was not necessary. The witnesses' recollection of this was vivid, and the testimony uncontradicted. The trial judge was in a unique position to evaluate the consent and to observe the participants. His decision on this point, in view of his other holdings, was unnecessary but the fact that he made it and found the way he did should be persuasive.

IV
THE QUESTION OF HARMLESS ERROR

The only items taken in this search were parts to a 1964 Pontiac which the defendant had legitimately purchase. Their possession by him of these items was in no way criminal, however, they were corroborative of the fact that he had altered the identification on a stolen car. The crime and all charges in the indictment involved only the stolen car. The existence of the wrecked vehicle and the parts undoubtedly made the case more graphic to the jury and maybe more easily understandable, but such evidence was not imperative for conviction.

There was no question that the car driven by Constance Melzer and apprehended by police on July 14, 1967, was not the car it purported to be and was in fact a stolen car from Cleveland, Ohio. This was proven by expert testimony which would have been sufficient for conviction on all the counts. The

evidence seized from Melzer was only further proof that the legitimate vehicle had not been repaired and was still sitting on his premises. These items would not be absolutely essential matters of proof and the conclusion must be that the admission of testimony about them would not be prejudicial in the overall context of the case.

There has been so much litigation involving the validity of the search, that the items taken have been magnified out of all proportion. There is still overwhelmingly sufficient probative evidence admitted, without any mention of these parts, to independently more than justify conviction beyond a reasonable doubt.

The appellant has argued that the Court of Appeals applied the wrong standard in determining whether the admission of this allegedly tainted evidence was harmless error. In support of this position he cites various language from the decisions of this Supreme Court in *Chapman* v. *California*, 386 U. S. 18, which suggests that the only criteria are whether the improper evidence was relevant and material to the case and might have contributed to the conviction.

We feel this language is deceptive. The true test and the test subsequently applied by this Court in *Harrington* v. *California*, 395 U. S. 250 (1969), is whether the evidence is overwhelmingly sufficient to independently establish the elements of the offense beyond a reasonable doubt. The Court of Appeals went far beyond this and held that the remaining evidence which was uncontradicted "inescapably leads a rational mind to but one conclusion, that of guilt." And further, that the tainted evidence did not affect the substantial right of this defendant, that such was not prejudicial, and that such error was harmless beyond a reasonable doubt.

It would seem that not only has the appellant misconceived the essence of the Court of Appeals' decision but has also misinterpreted the true standard to be applied. But what ever standard is used, the error here, if there is error, is harmless and it is harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons the State of Ohio respectfully urges that the writ requested in defendant's petition be denied.

David H. Bodiker
Assistant Prosecuting Attorney
Franklin County,
Columbus, Ohio 43215

Leo J. Conway
Assistant Attorney General
State of Ohio
40 South Third Street
Columbus, Ohio 43215

AFFIDAVIT

STATE OF OHIO
FRANKLIN COUNTY, SS:

David H. Bodiker, being duly sworn, deposes and says that he is an Assistant Prosecuting Attorney for Franklin County, Ohio, and that a copy of the foregoing Brief in Opposition has been mailed to George E. Tyack, 8 East Broad Street, Columbus, Ohio, 43215, this day of February, 1971.

David H. Bodiker

Sworn to before me and subscribed in my presence this day of February, 1971.

Notary Public